



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

October 2, 2003

Ms. Pamela Smith  
Assistant General Counsel  
Texas Department of Public Safety  
P.O. Box 4087  
Austin, Texas 78773-0001

OR2003-6969

Dear Ms. Smith:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 188637.

The Texas Department of Public Safety ("DPS") received a request for fourteen categories of information pertaining to a named employee. You claim that some of the requested information is excepted from disclosure under section 552.101 of the Government Code and Rule 503 of the Texas Rules of Evidence. To the extent other information responsive to the request exists, we presume you have released it. If you have not, you must do so at this time. *See* Gov't Code §§ 552.301, .302. We have considered the exceptions you claim and reviewed the submitted information.

We understand you to argue that because the information in Exhibit A is expressly public under section 552.022 of the Government Code and consists of privileged attorney-client communications, it is excepted under Rule 503 of the Texas Rules of Evidence. However, we do not agree that the information in Exhibit A is subject to section 552.022. Because section 552.107(1) is the proper section under the Public Information Act (the "Act") for attorney-client privileged information that is not subject to section 552.022, we will address your claim under that section. *See* Open Records Decision No. 676 at 8 (2002).

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002).

First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

In this instance, you inform us that the information in Exhibit A consists of confidential communications between privileged parties for the purpose of providing legal advice and opinions. Therefore, you may withhold Exhibit A under section 552.107 of the Government Code.

Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses confidentiality provisions found in other statutes. You argue that Exhibit B contains medical and psychological statements that are required by the Texas Commission on Law Enforcement Officer Standards and Education and that are confidential pursuant to Section 1701.306 of the Occupations Code. Section 1701.306 provides as follows:

- (a) The commission may not issue a license to a person as an officer or county jailer unless the person is examined by:

(1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and

(2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a physical examination, blood test, or other medical test.

(b) An agency hiring a person for whom a license as an officer or county jailer is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to the commission. *A declaration is not public information.*

We agree that most of the information in Exhibit B must be withheld. However, we have marked one document that is not protected under section 1701.306. Therefore, DPS must withhold the information in Exhibit B under section 552.101 in conjunction with section 1701.306 of the Occupations Code, with the exception of the document we have marked.

We note, however, that the document in Exhibit B that we have marked contains information that is confidential under section 552.117(a)(2) of the Government Code. Section 552.117(a)(2) excepts from public disclosure information that reveals a peace officer's home address, home telephone number, social security number, and whether the officer has family members.<sup>1</sup> We have marked a social security number that must be withheld under section 552.117(a)(2).

Finally, you assert that the document submitted as Exhibit C is confidential under the Americans with Disabilities Act. Title I of the ADA, 42 U.S.C. §§ 12101 *et seq.*, provides that a covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, provided that information about the medical conditions and medical histories of applicants or employees must be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as a confidential medical record. *See* 42 U.S.C. § 12112(d)(3)(B); *see also* 29 C.F.R. § 1630.14(b); Open Records Decision No. 641 (1996). You state that the information in Exhibit C "consists of information acquired from the [individual's] conditional job offer medical examination[.]" Upon review of the documents in question, we agree that the information in Exhibit C is excepted from disclosure under section 552.101 of the Government Code in conjunction with the ADA.

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<sup>1</sup>"Peace officer" is defined by article 2.12 of the Code of Criminal Procedure.

In summary, you may withhold the documents in Exhibit A under section 552.107. You must withhold the documents in Exhibit B under section 552.101 in conjunction with section 1701.306 of the Occupations Code, with the exception of the document we have marked for release. You must withhold the social security number we have marked under section 552.117(a)(2). You must withhold the documents in Exhibit C under section 552.101 and the ADA.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, reading "Jennifer E. Berry".

Jennifer E. Berry  
Assistant Attorney General  
Open Records Division

JEB/sdk

Ref: ID# 188637

Enc: Submitted documents

c: Mr. Richard Martin P. Canlas  
Attorney at Law  
300 West Davis, Suite 560  
Conroe, Texas 77301  
(w/o enclosures)